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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ALAN NOLAN, Defendant and Appellant.	G050798 (Super. Ct. No. 10NF3012) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Law Office of Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Richard Alan Nolan worked as a nurse at a hospital that accepts patients who have been temporarily committed for mental health reasons. (Welf. & Inst. Code, § 5150.) A jury convicted Nolan of committing sexual assaults against three such patients on three separate occasions. He raises several issues on appeal.

First, Nolan claims the trial court improperly excluded evidence regarding one of the victims' prior psychotic episodes and related expert testimony. We disagree. The trial court did not abuse its discretion.

Second, Nolan claims that the prosecutor committed misconduct ("error") during the closing argument by commenting on the excluded evidence and discouraging a hung jury. We disagree. The prosecutor's comments were not improper.

Third, Nolan claims that a jury instruction, which tells jurors how to evaluate the testimony of witnesses with mental impairments, is facially unconstitutional. We disagree. This is not the first time we have addressed this issue; we continue to hold that the challenged instruction passes constitutional muster.

Fourth, following his conviction, Nolan subpoenaed certain confidential records of the victims, which were delivered to the trial court. In an in camera hearing, the court reviewed the records and found that they did not contain discoverable evidence. We have reviewed those sealed records and agree with the trial court.

Finally, Nolan claims cumulative error requires reversal. Having found no individual claim of error to be meritorious, we reject Nolan's cumulative error claim.

I

FACTS AND PROCEDURAL BACKGROUND

Western Medical Center (Western Medical) is a hospital located in Anaheim. A portion of the hospital's emergency room known as C-side is designated for in-custody patients and those who are having behavioral health issues. (Welf. & Inst. Code, § 5150.) Nolan worked in the emergency room as a licensed vocational nurse.

Hospital records confirmed that Nolan had contact with patients Glen R. (Glen), Jonathan B. (Jonathan), and Richard M. (Richard) on three separate days in 2009 and 2010. Glen, Jonathan, and Richard each separately reported to the police that Nolan had sexually assaulted them while they were physically confined to a hospital bed.

Glen

In June 2009, Glen was having psychotic symptoms and was brought to C-side for an evaluation. Glen's arms, legs, and waist were restrained to a bed with leather belts. Glen was given an injection and dozed off. When Glen woke up he felt something, looked down, and saw Nolan "sucking on my penis." Glen was scared. The curtains were closed around the hospital bed and Nolan kept getting up and checking to make sure nobody was coming. Glen ejaculated. Glen was later transferred to a psychiatric unit within the hospital. The next day, when Glen got out of the hospital, he told his mother what had happened and they reported it to the police.

Jonathan

In December 2009, Jonathan had been diagnosed with paranoid schizophrenia and had been doing methamphetamine for two days. Jonathan had an argument with his mother who tried to take him to the hospital. On the way to the hospital, Jonathan tried to jump out of the car while it was moving. The police eventually brought Jonathan to C-side. The hospital staff removed his clothes and put him in a gown. After Jonathan's blood was taken and other medical procedures were performed, he was sedated. Both of Jonathan's hands were shackled to the bed with leather straps.

When Jonathan woke up, Nolan was sucking on his penis. The curtains around the bed were closed. Jonathan was still kind of dizzy and "it took [him] a few seconds to get a grip on what was going on." Jonathan said, "Stop." Nolan walked away. Jonathan did not say anything immediately because he did not want to look like he

had "insane issues." Jonathan later reported to police what had happened after he was released from jail on an unrelated burglary charge.

Richard

In July 2010, Richard was having suicidal thoughts and had a knife to his throat. He called 911 for help. Richard was under the influence of alcohol and reported that he had been given a lot of psychological medications that were causing him to behave bizarrely.

The police came to Richard's home, handcuffed him, and took him to the hospital. The police removed the handcuffs, and Richard was placed in a bed in C-side and restrained with a leather strap. Richard spoke to Nolan, who introduced himself as a doctor. Richard told Nolan that the medication he was taking was causing him to have trouble achieving an erection. While the curtains were completely closed around the bed, Nolan began what initially appeared to be a normal physical exam. Nolan pulled down Richard's pants and underwear. Nolan touched Richard's groin area and then began to touch and manipulate his penis with his bare hands.

Over the course of the next several hours, Nolan repeatedly returned to Richard's bed and masturbated him. Richard achieved an erection, but he never ejaculated. At one point, through the curtains, Richard overheard Dr. Scott Jacobs introduce himself to the patient to his right; Nolan immediately stopped what he was doing and covered Richard with a blanket. Dr. Jacobs pulled the curtains back, observed Richard and Nolan for a few seconds and then left. At one point, Nolan unstrapped Richard and let him use the bathroom. Richard cried in the bathroom and thought about running away.

Later, Nolan injected Benadryl into Richard's right arm. After that, Richard felt drowsy and began to fall asleep. When Richard woke up he was really drowsy and felt a sensation on his penis; Nolan was performing oral sex on him. Richard

tried to kick and push Nolan away. When Richard later reported the incident to the police, he did not tell them about Nolan performing oral sex on him because he was too ashamed and embarrassed.

Defense Case

Nolan testified that he did not sexually assault Glen, Jonathan, or Richard. Nolan said that he was not relieved of his duties after Glen and Jonathon's allegations. Nolan denied giving Richard an injection.

Several members of Western Medical's hospital staff testified that Nolan was a professional, honest, and truthful nurse. A doctor testified that Glen came in as paranoid schizophrenic and that such patients can be delusional. A registered nurse testified that she had administered antipsychotic medications to Glen, who was angry, hostile, anxious, and unruly. Other employees gave similar accounts of Glen's behavior.

A police officer testified that Glen told him that he suffered from schizophrenia, paranoia, hallucinations, and depression. Glen told the officer that he did not tell the hospital staff what had happened to him because he was afraid they would kill him.

Procedural Background

On April 24, 2012, the prosecution filed an information charging Nolan with five offenses. As to Glen and Jonathan, the prosecution charged Nolan with committing forcible oral copulation as well as sexual battery on an institutionalized person. (Pen. Code, §§ 288a, subd. (c), 243.4, subd. (b).)[1] As to Richard, the prosecution charged Nolan with committing sexual battery by fraud. (§ 243.4, subd. (c).) The

[1] Further undesignated statutory references will be to the Penal Code.

prosecution further alleged that Nolan had committed the two oral copulation offenses against multiple victims. (§667.61, subds. (b) & (e)(5).)

On June 21, 2013, a jury found Nolan guilty as charged and returned true findings on the multiple victim allegations. Nolan later subpoenaed correctional and booking records of the victims from Orange County and Los Angeles County Sheriff's Departments and jails. Following an in camera review, the trial court found that they did not contain any discoverable materials.

On September 26, 2014, the trial court imposed a 34 years to life sentence.

II

DISCUSSION

A. The Exclusion of Evidence

Nolan claims that the trial court improperly excluded evidence concerning Glen's prior medical mental health history and related expert witness testimony. We disagree and find the trial court committed no error.

Our task when reviewing a trial court's decision to exclude evidence is well settled: we review the record to determine if there was an abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) "An abuse of discretion standard requires the reviewing court to uphold the exclusion of evidence unless the reviewing court finds the trial court acted arbitrarily, capriciously, or in a patently absurd manner *and* that the exclusion of the evidence resulted in a *manifest* miscarriage of justice." (*People v. Foss* (2007) 155 Cal.App.4th 113, 124-126 [rejecting defendant's claim that a different standard of review should apply when he contends the excluded evidence denied him the right to confront and cross-examine witnesses].)

Here, prior to trial, there was a hearing about the admissibility of each of the three alleged victims' prior medical histories. The prosecutor sought to exclude this evidence arguing that it was not relevant to Nolan's alleged conduct on any of the days in question. However, the prosecutor conceded that any evidence concerning the victims'

mental conditions and how they were acting on the days when they encountered Nolan in the hospital was relevant and admissible. "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Glen's medical records indicated that he had been admitted to Western Medical under section 5150 of the Welfare and Institutions Code about a year prior to Nolan's alleged offense. Nolan's counsel argued that Glen's prior hospital stay was relevant for "a number of reasons" including impeachment purposes. Further, counsel argued that evidence concerning Glen's prior delusions or delusional behavior was relevant as to Glen's ability to perceive, observe, and report on what had allegedly happened to him. Counsel indicated that he had an expert who was prepared to testify "that when a physician in a 5150 E.R. takes a look at a patient's chart, the first thing they're looking for is history."

The court found "that the prior 5150 incidents, the details of those at this point are irrelevant. Certainly, why he was admitted on that day is [relevant].[2] But I'm not going to open up the victim's medical history and have a doctor opine to an issue that doesn't appear to be relevant to any ultimate fact that the jury has to decide in this particular case. [¶] Certainly, the basis for why he was there that evening, how he was feeling, whether he was delusional, whatever it may be, I have no idea why they admitted themselves or they were admitted by others on that day. It's certainly relevant, and that's fine."[3] The court also ruled that if Glen opened the door while testifying, such as saying

[2] The reporter's transcript quotes the judge as saying the word "irrelevant." But based on the context of the entire ruling, Nolan concedes there was likely a mistranscription.

[3] The court made a similar ruling as to Richard's prior medical history; as to Jonathan, there was no medical history.

"this is the first time I've ever been" to the hospital, defense counsel would not be precluded from impeaching the witness.

Plainly, the trial court considered the relevance of Glen's prior mental health history and his prior commitment at Western Medical after reviewing the proffered evidence and hearing conflicting argument. The court determined that the proffered evidence was irrelevant. That is, the court impliedly found that it did not tend to prove or disprove whether Nolan committed the alleged sexual assault against Glen. Conversely, the trial court did find relevant any evidence regarding the reason for Glen's admission and whether or not he may have been delusional on the day that Nolan allegedly sexually assaulted him. Based on this considered analysis, it is apparent that the trial court did not act in an arbitrary or capricious manner. Thus, we affirm the trial court's ruling regarding the exclusion of evidence as we are obligated to do.

Further, the jurors did hear evidence regarding Glen's mental state. The jurors heard testimony that Glen was a paranoid schizophrenic who suffered from hallucinations. They also heard testimony that a psychotic patient may exhibit abnormal behavior including illusions or hallucinations. Thus, the jurors ultimately heard exactly the type of evidence that Nolan sought to exclude.

B. Prosecutorial Misconduct

Nolan claims that the prosecutor committed "prosecutorial error" by making two improper statements during closing argument. He is mistaken. Neither statement constitutes prosecutorial misconduct.[4]

[4] We acknowledge that the term "prosecutorial misconduct" is something of a misnomer because it appears to suggest wrongful intent on the part of the prosecutor. (See *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) However, we are not going to use the term "prosecutorial error" as both parties did in their briefs. We note that the California Supreme Court continues to routinely refer to these types of claims as "prosecutorial misconduct." (See, e.g., *People v. Jackson* (2016) 1 Cal.5th 269, 347; *People v. Clark* (2016) 63 Cal.4th 522, 575.)

"The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

Generally, in order to raise any alleged errors on appeal, they must have first been brought to the attention of the trial court. This long-standing rule is commonly described as "'waiver,'" but is more accurately referred to as "'forfeiture.'" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) Generally, a defendant forfeits any complaint of prosecutorial misconduct on appeal unless he timely objected to the alleged misconduct at the time it occurred and also requested that the jury be admonished to reject the alleged impropriety. (See *People v. Ervine* (2009) 47 Cal.4th 745, 806.)

Nolan alleges that the prosecutor improperly: 1) argued about the absence of evidence that had been excluded; and 2) encouraged potential holdout jurors to capitulate to the will of the majority. We will address each allegation in turn.[5]

[5] Nolan failed to object during the prosecutor's closing argument, which constitutes a forfeiture of the issue on appeal. Nevertheless, we will review the merits of the prosecutorial misconduct issue and thereby circumvent Nolan's additional claim of ineffective assistance of counsel. (See *People v. Williams* (2000) 78 Cal.App.4th 1118, 1126 [court addressed forfeited issue, forestalling claim of ineffectual counsel]; 6 Witkin, Cal. Crim. Law (4th ed. 2012) Reversible Error, § 43, p. 574 ["The fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an *appellate court* is precluded from considering the issue"].)

1. *Arguing About the Absence of Excluded Evidence*

"It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.) However, a prosecutor's argument cannot mislead jurors and a prosecutor may commit misconduct by arguing about the absence of evidence that was excluded at his or her request. (See *People v. Daggett* (1990) 225 Cal.App.3d 751, 758.)

Here, during a pretrial hearing, the trial court reviewed the proffered evidence concerning Glen's prior mental health history and excluded that evidence at the prosecutor's request. The court also reviewed evidence concerning Richard's prior mental health history and excluded that evidence. The court then asked Nolan's counsel, "Let's see, Mr. Nicholson, what do you have on Jonathan?" Counsel responded, "Absolutely nothing."

During closing argument, while the prosecutor was commenting on *Jonathan's* testimony, he said: "And, of course, you don't hear any evidence that he had any history of hallucinating, having psychotic incidents, anything along those lines." Thus, when the prosecutor argued that *Jonathan* had no prior mental health history he was not referring to any evidence that had previously excluded; Jonathan had no prior mental health history.

The prosecutor's next sentence was: "Similar [*analysis* for] Glen." (Italics added.) Nolan infers that by referring to the *analysis* of Glen's testimony, the prosecutor was improperly arguing to the jury that Glen had no prior mental health history while knowing such evidence had been previously excluded by the court. We disagree and consider the prosecutor's words in context. At this point in his closing argument, the prosecutor had reviewed Jonathon's testimony and argued why it was credible. The prosecutor then shifted to Glen's testimony and argued why it was credible. Thus, it

appears the prosecutor was simply telling the jury that he was now going to apply the same *analysis* to Glen's testimony that he had just applied to Jonathan's testimony.

In sum, we do not find that the prosecutor improperly commented on any evidence that had been excluded at any point during closing argument.

2. *Encouraging Jurors to Capitulate to the Majority*

The California Constitution guarantees criminal defendants a right to a unanimous jury verdict. (Cal. Const. art. I, § 16; *People v. Vargas* (2001) 91 Cal.App.4th 506, 562.) "Unanimity obviously requires that each juror must vote for and acquiesce in the verdict. Acquiescence simply because the verdict has been reached by the majority is not an independent judgment, and if permitted, would undermine the right to a unanimous verdict." (*People v. Superior Court* (*Thomas*) (1967) 67 Cal.2d 929, 932.)

It is improper for a prosecutor to encourage a potential holdout juror to simply capitulate to the majority. (*People v. Boyette* (2002) 29 Cal.4th 381, 436-437 (*Boyette*).) In *Boyette*, the prosecutor "argued the evidence of guilt was quite strong, '[a]nd if there is one of you who can't see what happened in this courtroom, you're [*sic*] intelligence should be absolutely insulted by all the lying that's gone on here, if one of you can't see that, you['d] better step back, take a deep breath, think about your common sense and listen to your fellow jurors, because you are not seeing the forest through the trees, if you can't see this case. It is overwhelming.'" (*Ibid*.) The court found that the prosecutor's argument was not improper: "As shown, the prosecutor did not exhort holdout jurors to submit to the majority's views, but argued the evidence of guilt was so strong that if any juror had doubts, they should step back and use their common sense. The exhortation to 'listen to your fellow jurors' in this context meant to listen to *the arguments* of one's fellow jurors." (*Ibid*.)

Here, during rebuttal closing argument, the prosecutor reviewed some of the evidence he had previously introduced and said: "That's why you heard all this stuff.

I know most of you get it. I hope all of you get it. But if there's one of you who doesn't, then we don't have a guilty verdict. If there's one person who gets confused or starts getting tripped up on some of these arguments, then the defendant doesn't get held accountable. [¶] Make sure that doesn't happen. Whoever our foreperson ends up being, make sure that you work with each other. And if someone starts speculating or going into these nonsense arguments, just politely steer them back in the right direction so that the defendant can end up being accountable for what he did."

Just as in *Boyette*, the prosecutor did not encourage any potential holdout jurors to simply submit to the will of the majority. Rather, the prosecutor encouraged the foreperson to facilitate deliberations in order to make sure such each juror was able to "work with" the other jurors. Indeed, the prosecutor's argument to the potential foreperson tracked closely with the trial court's instructions: "When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard." (CALCRIM No. 3550.)

In any event, even if the prosecutor's remark was arguably inappropriate, the trial court properly instructed the jurors regarding their collective and individual responsibilities: "It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict *if you can*. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. *But do not change your mind just because other jurors disagree with you*." (CALCRIM No. 3550, italics added.) We presume the jury understood and followed the court's instructions. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 436 [alleged prosecutorial misconduct not prejudicial where trial court properly instructed jury on the law].)

In sum, we find no instances of prosecutorial misconduct that prejudiced Nolan's right to a fair trial.

C. Instructional Error

The trial court instructed the jury as follows: "In evaluating the testimony of a person with a (developmental disability, or a (cognitive or mental/or communication) impairment), consider all of the factors surrounding that person's testimony, including his or her level of cognitive development. [¶] Even though a person with a (developmental disability or a (cognitive or mental or communication) impairment), may perform differently as a witness because of his or her level of cognitive development, *that does not mean he or she is any more or less credible than another witness*. [¶] You should not discount or distrust the testimony of a person with a (developmental disability or a (cognitive or mental or communication) impairment), solely because he or she has such a (disability or impairment)." (CALCRIM No. 331, italics added.)

Nolan claims that this instruction lowered the prosecution's burden of proof in violation of his right to due process. Specifically, he challenges the italicized portion of the second sentence. He argues that the victims were less credible than other witnesses precisely because of their respective mental impairments and the instruction effectively told the jury to disregard that possibility. We disagree.

This court rejected a similar challenge to CALCRIM No. 331 in *People v. Catley* (2007) 148 Cal.App.4th 500 (*Catley*). In *Catley*, we concluded that the instruction does not bolster the testimony of a cognitively impaired witness; rather, it expressly directs the jury to "'consider all of the factors surrounding that person's testimony, including his or her level of cognitive development.'" (*Id*. at pp. 506-507, fn. 1, quoting CALCRIM No. 331.) The instruction informs the jury that it should not reject a witness' testimony based solely on a mental or cognitive impairment—but, at the same time—the jury should not consider such a witness "'any more or less credible'" than any other witness. (*Catley*, at p. 506.)

We have not changed our view since *Catley*. We still hold that CALCRIM No. 331 does not require the jury to accept the testimony of a cognitively impaired

witness, nor does it require the jury to ignore the possibility that a witness with a cognitive or mental impairment may have been dishonest or inaccurate.

As Nolan acknowledges, several courts have analyzed a parallel instruction concerning the evaluation of a child witness who is 10 years of age or younger. (CALCRIM No. 330, formerly CALJIC No. 2.20.1.) And every court that has analyzed that instruction has rejected similar challenges. (See, e.g., *People v. Fernandez* (2013) 216 Cal.App.4th 540, 560 [the challenged instruction "does not instruct the jury to subject a child's testimony to a less rigorous credibility determination, nor does it excessively inflate a child witness's credibility"]; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392–1394 [the challenged instruction does not lessen prosecutor's burden of proof and deny defendant due process and equal protection]; see also *People v. McCoy* (2005) 133 Cal.App.4th 974, 979-980; *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457.)

In sum, the trial court's use of CALCRIM No. 330 did not violate Nolan's right to due process of law.

D. Review of Sealed Victim Records

The "due process clause requires the 'government' to give the accused all 'material' exculpatory evidence 'in its possession,' even where the evidence is otherwise subject to a state privacy privilege, at least where no clear state policy of 'absolute' confidentiality exists. [Citation.] When the state seeks to protect such privileged items from disclosure, the court must examine them in camera to determine whether they are 'material' to guilt or innocence." (*People v. Webb* (1993) 6 Cal.4th 494, 518 (*Webb*), quoting *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57-61.)

In *Webb*, the defendant in a murder trial had subpoenaed a witness's psychiatric records. (*Webb*, *supra*, 6 Cal.4th at pp. 515-516.) The lower court had examined the records in camera and had generally concluded that they contained no discoverable information. (*Id*. at p. 518.) The sealed records were included in the record

on appeal. (*Id*. at p. 517.) The appellate court conducted its "own careful review of the records" and found no error by the trial court. (*Id*. at p. 518.)

Here, in preparation for a new trial motion, Nolan subpoenaed correctional and booking records from the Orange and Los Angeles County Sheriff's Departments and jails regarding the victims. The trial court reviewed the records in camera and determined that they were not relevant and discoverable to the defense. Nolan requested that we conduct the same type of appellate review that was conducted in *Webb*. The Attorney General had no objection.

We have reviewed the victims' sealed records and agree with the trial court that the records do not contain relevant discoverable information.

E. Cumulative Error

"In theory, the aggregate prejudice from several different errors occurring at trial could require reversal even if no single error was prejudicial by itself." (*In re Reno* (2012) 55 Cal.4th 428, 483.) However, the rejection of each of a defendant's individual claims "cannot logically be used to support a cumulative error claim [where] we have already found there was no error to cumulate." (*Ibid*.; see also *People v. Williams* (2013) 56 Cal.4th 165, 201.)

Here, we have analyzed each of Nolan's individual claims and have determined that none of them constitute error. Thus, we reject Nolan's claim of cumulative error.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O’LEARY, P. J.

FYBEL, J.